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Privacy and Civil Liberties Oversight Board: 109th Congress Proposed Refinements

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Summary

Among the recommendations made by the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) in its final report was the creation of a board within the executive branch to oversee adherence to guidelines on, and the commitment to defend, civil liberties by the federal government. This report examines the realization of this recommendation with the creation of the Privacy and Civil Liberties Oversight Board, and efforts in the 109th Congress to refine the mandate and the mission of the board (H.R. 1310). This report will be updated as events warrant.

The final report of the 9/11 Commission recommended that “there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties.”¹ This recommendation was the third and final one made in a section of the report captioned “The Protection of Civil Liberties.” In the other two, the commission recommended that (1) the President, in the course of determining the guidelines for information sharing among government agencies and by them with the private sector, “should safeguard the privacy of individuals about whom information is shared”; and (2) the “burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive’s use of the powers to ensure protection of civil liberties. If the power is granted,” the report added, “there must be adequate guidelines and oversight to properly confine its use.”² Read together, these recommendations called for a board to oversee adherence to presidential guidelines on information sharing that safeguard the privacy of individuals about whom information is shared, and adherence to guidelines on the executive’s continued use of powers that materially enhance security. The report offered no additional commentary on the composition, structure, or operations of the recommended board. Such a board, however, had been proposed in December 2003 in

¹ U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: GPO, 2004), p. 395.

² *Ibid.*, pp. 394-395.

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the fifth and final report of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, chaired by former Virginia Governor James S. Gilmore III.³

Legislative Implementation

Among the initial bills offered to implement the recommendations of the 9/11 Commission was one introduced on September 7, 2004, by Senator John McCain (S. 2774).⁴ Title IX of the proposal would have established a five-member Privacy and Civil Liberties Oversight Board within the Executive Office of the President. While board members would have been appointed by the President with Senate confirmation, and could not concurrently have held any other federal government position, their term of office was not specified, suggesting that they would have served at the pleasure of the President. Among the functions specified for the board to perform were (1) the provision of advice and counsel to the President and the executive departments and agencies, both on policy development and implementation related to the protection of the nation from terrorism, and to ensure that privacy and civil liberties were appropriately considered in the development and implementation of terrorism policy; (2) continual review of such policy and its implementation, including information sharing practices, to ensure that privacy and civil liberties were protected; (3) receipt and review of reports from privacy and civil liberties officers prescribed elsewhere in the legislation; and (4) periodic submission, not less than semiannually, of reports to Congress and the President. A companion bill was introduced in the House on September 9 by Representative Christopher Shays (H.R. 5040) for himself and 32 cosponsors, and was referred to 10 committees. However, no further action was taken on either proposal during the 108th Congress.

A somewhat similar bill to implement the recommendations of the 9/11 Commission was offered by Representative Nancy Pelosi (H.R. 5024) on September 8, 2004. Title V of this proposal directed the President to determine guidelines for acquiring, accessing, using, and sharing information about individuals among federal, state, and local governments, as well as the private sector. It also would have established “within the executive branch a board to oversee adherence to” the President’s afore-mandated guidelines and “the commitment the Government makes to defend civil liberties.” No additional details regarding the board were specified. The bill was referred to 11 House committees, but no further action was taken on it during the 108th Congress.

Selected by the Senate majority and minority leaders to lead the effort to implement the recommendations of the 9/11 Commission legislatively, Senator Susan Collins, the chair of the Committee on Governmental Affairs, and Senator Joseph Lieberman, the ranking minority member on the panel, initially discussed the general terms of their reform bill at a September 15, 2004, press conference. One of its components would have

³ U.S. Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, *V. Forging America’s New Normalcy: Securing Our Homeland, Preserving Our Liberty* (Arlington, VA: Rand Corporation, 2003), pp. 22-23.

⁴ See *Congressional Record*, daily edition, vol. 150, Sept. 8, 2004, pp. S8869-S8915.

been a civil liberties oversight board.⁵ The draft text of the legislation was made public on September 20, 2004. The Committee on Governmental Affairs began a markup of the Collins proposal on September 21, and completed action the following day when the committee ordered the amended measure favorably reported as an original bill. Introduced by Senator Collins as an original bill on September 23, the legislation (S. 2840) was denominated the National Intelligence Reform Act.⁶ The proposal was also introduced a second time that day, with Senator Lieberman as a cosponsor (S. 2845). At the end of the day, a unanimous-consent agreement was reached providing that, on September 27, the Senate would begin consideration of the latter bill (S. 2845). A bill very similar to the Senate vehicle was introduced in the House on September 24 by Representative Christopher Shays with bipartisan support (H.R. 5150), but no further action was taken on this measure during the 108th Congress.

As the Senate began consideration of S. 2845 on September 27, the legislation, among other provisions, mandated the establishment of a Privacy and Civil Liberties Oversight Board within the Executive Office of the President (EOP). Its chair and four additional members would be appointed by the President with Senate confirmation for six-year terms. These provisions regarding the board remained in the bill, which the Senate adopted in amended form on a 96-2 vote on October 6.

In the House, the vehicle for implementing the recommendations of the 9/11 Commission was introduced by Speaker Dennis Hastert on September 24, and was denominated the 9/11 Recommendations Implementation Act (H.R. 10). The bill drew upon a September 16 draft proposal for strengthening the intelligence capabilities of the federal government that the President had submitted to Congress, with additional input from committee chairs who had held hearings on the findings and recommendations of the 9/11 Commission during August and the early weeks of September. As a result, the bill contained various provisions not found in the counterpart Senate bill (S. 2845), as introduced. The House bill was referred to the Committees on Armed Services, Education and the Workforce, Energy and Commerce, Financial Services, Government Reform, International Relations, the Judiciary, Rules, Science, Transportation and Infrastructure, and Ways and Means, as well as the Permanent Select Committee on Intelligence and the Select Committee on Homeland Security. Five of these panels — Armed Services, Financial Services, Government Reform, Intelligence, and Judiciary — conducted markups and ordered the resulting versions of the legislation reported on September 29.

As introduced, H.R. 10 mandated a Civil Liberties Protection Officer — to be appointed by a new National Intelligence Director (NID) — within the office of the NID to serve as a civil liberties and privacy overseer of the intelligence community, but no provision was made for a civil liberties oversight board. The version of the bill ordered reported by the Committee on the Judiciary included a provision, added during markup, establishing a Privacy and Civil Liberties Oversight Board very similar to the one which

⁵ Amy Klamper and John Stanton, “Intelligence: ... As Collins, Lieberman Unveil a Response to 9/11 Panel,” *CongressDailyPM*, Sept. 15, 2004, available at [<http://nationaljournal.com/pubs/congressdaily/dj040915.html>]; Philip Shenon, “Intelligence Proposals Gain in Congress,” *New York Times*, Sept. 16, 2004, p. A15.

⁶ See *Congressional Record*, daily edition, vol. 150, Sept. 23, 2004, pp. S9615-S9638.

would have been created by the Senate counterpart measure (S. 2845), except it would have been an independent agency within the executive branch and not located in the EOP. This provision, however, was omitted from the version of the bill reported from the Committee on Rules on October 7.⁷ The board, constituted as an EOP agency, would have been included in the House bill pursuant to an amendment substituting the text of the Senate counterpart bill, as introduced (S. 2845), and the earlier McCain bill, as introduced (S. 2774),⁸ but this amendment was defeated on a 203-213 vote.⁹ The version of the House bill adopted on a 282-134 vote on October 8 made no provision for a civil liberties oversight board.

The conference committee version of the intelligence reform legislation retained the mandate for a Privacy and Civil Liberties Oversight Board.¹⁰ Located within the EOP, the board would consist of a chair, vice chair, and three additional members, all appointed by, and serving at the pleasure of, the President. Nominees for the chair and vice chair positions would be subject to Senate approval. While the board would have most of the review and advice responsibilities contained in the Senate-adopted version of the legislation, it would not have subpoena power, but was authorized to request the assistance of the Attorney General in obtaining desired information from persons other than federal departments and agencies. Also, the eight privacy and civil liberties officers that the Senate-adopted version of the legislation would have established within specified departments and agencies were addressed in a sense of Congress provision stating “that each executive department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer.” On December 7, the House, on a 336-75 vote, agreed to the conference committee report; the Senate gave its approval the following day on an 89-2 vote, clearing the intelligence reform legislation for the President’s signature. On December 17, President George W. Bush signed the legislation into law.¹¹

Elsewhere, when reporting the Transportation, Treasury, and General Government Appropriations Bill, 2005, the Senate Committee on Appropriations indicated that Section 520 of the legislation (S. 2806) “directs each agency to acquire a Chief Privacy Officer to assume primary responsibility for privacy and data protection policy.” These officials appeared to be very similar to the privacy officers prescribed in the intelligence reform bill as introduced by Senator Collins. Section 520 appeared in Title V of the legislation. “Those general provisions that address activities or directives affecting all of the agencies covered in this bill,” the committee report explained, “are contained in title V.” Thus, the provision applied only to agencies directly funded by the legislation. “General provisions

⁷ See *ibid.*, Oct. 7, 2004, pp. H8726-H8792.

⁸ For the text of the amendment, see U.S. Congress, House Committee on Rules, *Providing for Consideration of H.R. 10, 9/11 Recommendations Implementation Act*, H.Rept. 108-751, a report to accompany H.Res. 827, 108th Cong., 2nd sess. (Washington: GPO, 2004), pp. 5-152; *Congressional Record*, daily edition, vol. 150, Oct. 7, 2004, pp. 8792-H8833.

⁹ *Congressional Record*, daily edition, vol. 150, Oct. 7, 2004, p. H8850.

¹⁰ See U.S. Congress, House, Committee of Conference, *Intelligence Reform and Terrorism Prevention Act of 2004*, H.Rept. 108-796, a report to accompany S. 2845, 108th Cong., 2nd sess. (Washington: GPO, 2004).

¹¹ P.L. 108-458; 118 Stat. 3638.

that are governmentwide in scope,” noted the report, “are contained in title VI of this bill.”¹²

Transportation, Treasury, and General Government Appropriations were among those which came to be included in the Consolidated Appropriations Act, 2005 (H.R. 4818), and constituted Division H of that legislation.¹³ Within that division, Section 522 stated: “Each agency shall have a Chief Privacy Officer to assume primary responsibility for privacy and data protection policy,” and specified nine particular activities to be undertaken by such officers. The section further prescribed privacy and data protection policies and procedures to be established, reviews to be undertaken, and related reports to be made. Located in Title V of the division, the requirements of the section appeared to be applicable only to agencies directly funded by the division. Furthermore, it did not appear that the section created new positions, but instead prescribed that privacy officer responsibilities be assigned to an appropriate individual in an existing position.¹⁴ Nonetheless, concerned that these privacy officers might undercut the authority of chief information officers, Representative Tom Davis, chairman of the Committee on Government Reform, introduced H.R. 1271, repealing the privacy section, on March 14; the bill was referred to the Committee on Government Reform.

Legislative Refinements

No nominations to membership positions on the Privacy and Civil Liberties Oversight Board were made in the early weeks of the 109th Congress, and the President’s initial FY2006 budget documents contained no request for funds for the panel, although a later justification document requested \$750,000.¹⁵ In mid-May, a bipartisan group of Senators — Susan Collins, Richard J. Durbin, Patrick J. Leahy, and Joseph I. Lieberman — sent a letter to White House Chief of Staff Andrew H. Card, Jr., asking for a timetable and details on how the membership and staff of the board would be put in place. The letter also noted that the proposed budget for the board was well below the \$13 million sought for the Office of Civil Rights and Civil Liberties at the Department of Homeland Security, the \$39 million requested for the Office of the Trade Representative, and the \$4 million for the Council of Economic Advisers. A White House spokesman indicated that “the hope is to move quickly” on the appointment of board members.¹⁶ On June 10, the White House announced that President Bush would nominate Carol Dinkins to be chair and Alan Charles Raul to be vice chair of the board, both subject to Senate approval. The President also would name Lanny Davis, Theodore Olsen, and Francis Taylor to serve as members of the board.

¹² U.S. Congress, Senate Committee on Appropriations, *Transportation, Treasury and General Government Appropriations Bill, 2005*, S.Rept. 108-342, a report to accompany S. 2806, 108th Cong., 2nd sess. (Washington: GPO, 2004), pp. 200, 202.

¹³ P.L. 108-447; 118 Stat. 2809.

¹⁴ *Congressional Record*, daily edition, vol. 150, Nov. 19, 2004, pp. H10358-H10359.

¹⁵ U.S. Office of Management and Budget, *Executive Office of the President: Fiscal Year 2006 Congressional Budget Submission* (Washington: n.d.), p. 111.

¹⁶ Eric Lichtblau, “Senators Say Bush Lags on Creating Terror Panel,” *New York Times*, May 15, 2005, p. 25.

In a January 2005 interview with *Federal Computer Week* staff covering a range of issues, Representative Tom Davis, chairman of the House Committee on Government Reform, took issue with the Consolidated Appropriations Act's Section 522 requirement concerning privacy officers. He expressed concern that these privacy officers might undercut the authority of chief information officers. "Let's not make it so confusing that the CIOs basically lose control of computer security and privacy becomes the overriding concern," he said in the interview. Indicating he will seek to eliminate Section 522, he also suggested he was not opposed to the concept, saying: "These privacy officers have got to be put into perspective."¹⁷

A February 11, 2005, memorandum to the heads of the executive departments and agencies from Clay Johnson III, Deputy Director for Management, Office of Management and Budget (OMB), appeared to sweep beyond the Section 522 requirement, and asked recipients, within the next 30 days, "to identify to OMB the senior official who has the overall agency-wide responsibility for information privacy issues." Expressing the administration's commitment "to protecting the information privacy rights of Americans and to ensuring Departments and agencies continue to have effective information privacy management programs in place to carry out this important responsibility," it noted that a Chief Information Officer or "another senior official (at the Assistant Secretary or equivalent level) with agency-wide responsibility for information privacy issues" could be named.¹⁸

About a month later, on March 15, Representative Carolyn B. Maloney introduced H.R. 1310, the Protection of Civil Liberties Act, for herself and 23 bipartisan cosponsors. The bill was referred to the Government Reform, Homeland Security, Intelligence, and Judiciary committees. Among other modifications, the legislation would, if enacted, reconstitute the Privacy and Civil Liberties Oversight Board as an independent agency within the executive branch, make all appointments to the board's membership subject to Senate confirmation, and limit the board's partisan composition to not more than three members being from the same political party.¹⁹

During House consideration of the Transportation, Treasury, Housing and Urban Development appropriation bill (H.R. 3058) on June 29, Representative Maloney offered an amendment, which was agreed to, increasing the funding for the Privacy and Civil Liberties Oversight Board from \$750,000 to \$1.5 million. This provision remained in the bill when it was approved by the House the following day.

¹⁷ FCW staff, "The Davis Plan," *Federal Computer Week*, vol. 19, Jan. 24, 2005, pp. 16, 18.

¹⁸ U.S. Office of Management and Budget, "Designation of Senior Agency Officials for Privacy," Memorandum for Heads of Executive Departments and Agencies from Clay Johnson III, Deputy Director for Management (Washington: Feb. 11, 2005).

¹⁹ See *Congressional Record*, daily edition, vol. 151, Mar. 16, 2005, p. E456.